Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TURTLE ISLAND RESTORATION NETWORK, TODD STEINER, THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, AND THE HUMANE SOCIETY OF THE UNITED STATES,

Petitioners,

v.

DONALD L. EVANS, SECRETARY OF COMMERCE, COLIN L. POWELL, SECRETARY OF STATE, PAUL H. O'NEILL, SECRETARY OF THE TREASURY, DAVID B. SANDALOW, ASSISTANT SECRETARY OF STATE FOR THE BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, PENELOPE D. DALTON, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE, AND ALAN P. LARSON, UNDER SECRETARY OF STATE FOR ECONOMIC, BUSINESS AND AGRICULTURAL AFFAIRS,

Respondents,

and

NATIONAL FISHERIES INSTITUTE, INC.,

Intervenor-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Under the United States Constitution and the Uruguay Round Agreements Act, may the Executive Branch limit the intended scope of a domestic statute in order to accommodate trade-related objections and a ruling of the World Trade Organization?

2. Under the Constitution and the Administrative Procedures Act, must the judiciary set aside agency regulations that are contrary to law, or may it deny relief on the basis of equitable discretion and out of deference to the Executive Branch's foreign policy objectives?

3. May the judiciary defer to a new agency interpretation of Section 609 of the Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act of 1990, that conflicts with the agency's long-standing previous interpretations of the law, and with the interpretation of another agency?

4. Under statutory prerogative—including pursuant to the Endangered Species Act—and this Court's precedent, is the preservation of severely endangered sea turtle species of paramount importance in the interpretation of Section 609?

5. May the Executive Branch's desire to appease foreign trading partners subvert Congress' intent to ensure equal treatment for the United States' shrimping fleet under Section 609?

PARTIES TO THE PROCEEDING

The parties to the proceedings before the United States Court of Appeals for the Federal Circuit were petitioners Turtle Island Restoration Network, Todd Steiner, The American Society for the Prevention of Cruelty to Animals, The Humane Society of the United States, and the Sierra Club, as well as respondents Donald L. Evans (Secretary of Commerce), Colin L. Powell (Secretary of State), Paul H. O'Neill (Secretary of the Treasury), David B. Sandalow (Asst. Secretary of State for the Bureau of Oceans and International Environmental and Scientific Affairs), Penelope D. Dalton (Asst. Administrator for Fisheries, National Marine Fisheries Service), and Alan P. Larson (Under Secretary of State for Economic, Business and Agricultural Affairs). The National Fisheries Institute, Inc. intervened on behalf of respondents, and the Georgia Shrimp Association, Boone Seafood, Dr. Frank V. Paladino, Dr. Wallace J. Nichols, Dr. Selina Saville Heppell, Dr. James R. Spotila, Dr. David W. Owens, Dr. Pamela Plotkin, Dr. Jeanette Wyneken, and Dr. Anthony C. Steyermark appeared as amici curiae in support of petitioners' petition for rehearing and suggestion for rehearing en banc.

RULE 29.6 STATEMENT

Petitioners have no corporate parents or subsidiaries, and no publicly held company owns 10% or more of any petitioner's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Reasons For Granting Review 2

B. Statement Of Facts 4

1. Proceedings Before The CIT. 8

2. Proceedings Before The WTO. 10

3. The Current Litigation. 11

4. The Federal Circuit's Decision. 12

5. The Order On Rehearing. 14

REASONS FOR GRANTING THE WRIT 16

A. The Court Of Appeals' Decision Violates Fundamental Tenets Of Our Democracy. 16

B. The Agencies' Construction Of Section 609, Designed To Appease Foreign Trading Partners, Is Fundamentally Flawed. 21

C. This Court's Review Of The Court Of International Trade's Failure To Set Aside The Illegal Guidelines Is Important To Restore Public Confidence In The Judicial System. 26

TABLE OF CONTENTS—Continued

Page

D. The Court Of Appeals' Opinion Ratifying A Shipment-By-Shipment Exception To The Shrimp Embargo Conflicts With Supreme Court Decisions Regarding Conservation Of Endangered Species Under The ESA And Undermines Important Policies Reflected In That Statute And Section 609. 28

CONCLUSION 30

APPENDIX A: Opinion of the United States Court of Appeals for the Federal Circuit, dated March 21, 2002 ..... 1a

APPENDIX B: Opinion of the United States Court of International Trade, dated July 19, 2000 ..... 39a

APPENDIX C Memorandum of the United States Court of International Trade, dated April 2, 1999 ..... 69a

APPENDIX D: Order of the United States Court of Appeals for the Federal Circuit denying petition for rehearing and rehearing en banc, dated August 8, 2002 ..... 103a

APPENDIX E: Judgment of the United States Court of Appeals for the Federal Circuit, dated March 20, 2002 ..... 113a

APPENDIX F: Statutory provisions 115a

APPENDIX G: U.S. Dep't of State, Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 61 Fed. Reg. 17342 (Apr. 19, 1996) 129a

TABLE OF CONTENTS—Continued

Page

APPENDIX H: U.S. Dep't of State, Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 63 Fed. Reg. 46094 (Aug. 29, 1998) 139a

APPENDIX I: U.S. Dep't of State, Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36946 (July 8, 1999) 151a

APPENDIX J: Statement of Administrative Action, Uruguay Round Agreements Act 177a

TABLE OF AUTHORITIES

CASES

Page(s)

Algoma Steel Corp. v. United States, 865 F.2d 240 (Fed. Cir. 1989), *cert. denied*, 492 U.S. 919 (1989) 21

Carpet, Linoleum & Resilient Tile Layers v. Brown, 656 F.2d 564 (10th Cir. 1981) 27

Charlton v. United States, 412 F.2d 390 (3d Cir. 1969) 27

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 17, 18

Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) 24

DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568 (1988) 18

Earth Island Institute v. Albright, 147 F.3d 1352 (Fed. Cir. 1998) 10

Earth Island Institute v. Christopher, 948 F. Supp. 1062 (CIT 1996) 17

Earth Island Institute v. Christopher, 942 F. Supp. 597 (CIT 1996) 10

Earth Island Institute v. Christopher, 913 F. Supp. 559 (CIT 1995) 8

Earth Island Institute v. Christopher, 890 F. Supp. 1085 (CIT 1995) 4

Earth Island Institute v. Daley, 48 F. Supp. 2d 1064 (CIT 1999) 4

Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999) 27

George E. Warren Corp. v. EPA, 159 F.3d 616 (D.C. Cir. 1998) 21

INS v. Cardoza Fonseca, 480 U.S. 421 (1987) 18

International Union of Operating Engineers v. Arthurs, 355 F. Supp. 7 (W.D. Okla. 1973) 28

Legal Environmental Assistance Foundation, Inc. v. EPA, 118 F.3d 1467 (11th Cir. 1997) 27

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 16, 27

TABLE OF AUTHORITIES—Continued

Page

Mississippi Poultry Association v. Madigan, 31 F.3d 293 (5th Cir. 1994) 17
Mississippi Poultry Association v. Madigan, 992 F.2d 1359 (5th Cir. 1993) 18, 20
Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 18
Pierce v. Underwood, 487 U.S. 552 (1988) 27
Suramerica de Aleaciones Laminadas C.A. v. United States, 966 F.2d 660 (Fed. Cir. 1992) 21
The Over The Top; Schroeder v. Bissell, 5 F.2d 838 (D. Conn. 1925) 18
Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 16, 28
United Savings Association of Texas v. Timbers of Inwood Forest Associates, 484 U.S. 365 (1988) 23
United States v. Menasche, 348 U.S. 528 (1955) 24
United States v. Monsanto, 491 U.S. 600 (1989) 27

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art III, § 2 1
U.S. Const. art. I, § 8 ..... 1, 16
Administrative Procedures Act, 5 U.S.C. § 706 21
Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*
16 U.S.C. § 1531 *et seq.* 4, 28
16 U.S.C. § 1531(b) 28
16 U.S.C. § 1531(c)(1) 28
Uruguay Round Agreements Act, 19 U.S.C. §§ 3511-3512 19
28 U.S.C. § 1295(a)(5) 12, 13
Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. 101-162, 103 Stat. 1037 (1989) (codified at 16 U.S.C. § 1537 note (2000)) 6
§ 609(a) 8, 10
§ 609(b) ..... 8, 9, 22, 23 ,24

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS

Page

135 Cong. Rec. S8335 (July 20, 1989) 6
135 Cong. Rec. S12191 (Sept. 29, 1989) 7

FEDERAL REGULATIONS

52 Fed. Reg. 24244 (June 29, 1987) 4, 5
56 Fed. Reg. 1051 (Jan. 10, 1991) 7
56 Fed. Reg. 357 (Jan. 4, 1991) 6
57 Fed. Reg. 40861 (Sept. 8, 1992) 5
65 Fed. Reg. 69118 (Nov. 15, 2000) 8
67 Fed. Reg. 37723 (May 30, 2002) 22

OTHER AUTHORITIES

Spotila, et al., *Pacific Leatherback turtles face extinction*, 405 Nature 529-530 (June 2000) 29
United States–Import Prohibition on Certain Shrimp and Shrimp Products, First Submission of the United States, WT/DSB/M/31 (June 9, 1997) 4, 8
United States–Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Panel, WT/DS58/R (May 15, 1998) 10
United States–Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R (Oct. 12, 1998) 8, 11

Petitioners Turtle Island Restoration Network, Todd Steiner, The American Society for the Prevention of Cruelty to Animals, and The Humane Society of the United States (collectively, "TIRN") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The April 2, 1999 decision of the Court of International Trade is reported at 48 F. Supp. 2d 1064, and is reprinted in the appendix to this petition at Pet. App. 69a-101a. A subsequent decision of the Court of International Trade in the same action, dated July 19, 2000, is reported at 110 F. Supp. 2d 1005 and is reprinted at Pet. App. 39a-68a.

On March 21, 2002, a divided panel of the United States Court of Appeals for the Federal Circuit issued its opinion in this matter, which is reported at 284 F.3d 1282 and is reprinted at Pet. App. 1a-38a. On August 8, 2002, the Court of Appeals denied without comment TIRN's petition for rehearing and suggestion for rehearing en banc, with two judges dissenting and filing a detailed written opinion. The Order and dissenting opinion are reported at 299 F.3d 1373 and are reprinted at Pet. App. 103a-111a.

JURISDICTION

The United States Court of Appeals for the Federal Circuit rendered its decision on March 21, 2002. TIRN timely filed a petition for rehearing with suggestion for rehearing en banc, which the Court of Appeals denied on August 8, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The United States Constitution, art. I, § 8, and art. III, § 2, respectively, provide that the Congress has "the Power . . . To make all Laws," and the Judiciary has the power and duty to enforce them.

The statutory provisions involved herein are Section 609, Title VI, of the Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. 101-162, 103 Stat. 1037 (Nov. 21, 1989), codified at 16 U.S.C. § 1537 note (2000), and reprinted at Pet. App. 115a-117a; the Administrative Procedures Act, 5 U.S.C. § 706, reprinted at Pet. App. 118a ; and the Uruguay Round Agreements Act, 19 U.S.C. §§ 3511-3512, reprinted at Pet. App. 175a-179a.

The agency regulations involved herein are the Department of State's *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 61 Fed. Reg. 17342 (April 19, 1996), reprinted at Pet. App. 128a-136a; *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations*, 63 Fed. Reg. 46094 (August 28, 1998), reprinted at Pet. App. 137a-148a; and *Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 64 Fed. Reg. 36946 (July 8, 1999), reprinted at Pet. App. 149a-174a.

STATEMENT OF THE CASE

A. Reasons for Granting Review

Domestic regulation of the shrimp/sea turtle fishery presented (along with similar regulation of the tuna/dolphin fishery) the first challenges to trade laws designed to protect wildlife at the GATT, and subsequently the World Trade Organization ("WTO"). While lower courts consistently—and appropriately—found that the Executive Branch must defer to Congress in enforcing such laws, the State Department preferred to follow a course of appeasing foreign fishing interests and trading partners and, ultimately, of reversing its own interpretation of a domestic statute in order to capitulate to a panel decision of the WTO. Now, the United States Court of Appeals for the Federal Circuit has, for the first time, sanctioned the abdication of the

roles of the Executive and Judiciary, by putting primacy in the rulings of an international treaty organization and derogating the authority of the United States Congress. Such abdication presents an issue of exceptional importance, particularly as international legal bodies proliferate today and as Congress looks to provide U.S. leadership on any number of important issues.

The U.S. Court of International Trade similarly abdicated its responsibility by refusing to set aside a regulation it appropriately ruled to be contrary to law, requiring instead an additional showing of harm found nowhere in the Administrative Procedures Act or in the jurisprudence of any other Court of the land. The failure to set aside an illegal regulation impeaches the very core of our tripartite system of government, leaving no recourse for the Executive's failure to follow the Laws of Congress. This Court should grant review to restore the appropriate role of the Judicial Branch.

This Court should further grant review because the fate of the U.S. domestic shrimping industry may well hang in the balance. The principal statute at issue in this case, Section 609, indisputably was promulgated to ensure that the U.S. industry would not be put at a competitive disadvantage by conservation laws designed to protect species which swim across "borders" and oceans. But the State Department's construction of Section 609 does precisely the opposite, elevating trade goals and the interests of foreign fleets over those of our own domestic industry, in direct contravention of Congress' intent.

Finally, this Court should grant review because it is the appropriate prerogative of the Congress to protect ancient sea turtle species. It is impossible to exaggerate the severely imperiled status of these creatures, many of which hover on the brink of extinction. Sea turtles are remarkably intelligent and agile, despite their often Promethean size. They inhabited the planet long before man, before many dinosaur species, and in normal circumstances can live well past one hundred years. Simply stated, their survival now depends

on mankind's willingness to alter fishing practices which undeniably have been the paramount factor in their precipitous decline. The Congress decided to attempt to save the species. Whether we, in fact, do so is a question of exceptional importance that warrants this Court's review.

B. Statement of Facts

Sea turtles are air-breathing marine reptiles that have existed in the world's oceans for millions of years. In the past century, however, commercial fishing and other human activities have decimated their populations, so much so that today, only seven species of sea turtles remain and all five of the species living in U.S. waters are listed as "endangered" or "threatened" under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.* *See Earth Island Inst. v. Christopher*, 890 F. Supp. 1085, 1088 (CIT 1995).

It is undisputed that "'the incidental capture and drowning of sea turtles in shrimp trawl nets has caused the greatest number of human-induced sea turtle deaths, accounting for more deaths than all other human activities combined.'" *Earth Island Inst. v. Daley*, 48 F. Supp. 2d 1064, 1070 (CIT 1999) (quoting *United States–Import Prohibition on Certain Shrimp and Shrimp Products*, First Submission of the United States, WT/DSB/M/31, § III, ¶ 19 (June 9, 1997)). As shrimp trawlers drag their nets along the ocean for hours at a time, they sweep up virtually all marine life in their path. Sea turtles trapped in these nets become entangled and, unable to surface for air, strangle or drown. *Earth Island Inst. v. Christopher*, 890 F. Supp. at 1088. In order to address this problem, the National Marine Fisheries Service ("NMFS") developed a simple trap-door mechanism, called a Turtle Excluder Device or "TED," which - when attached to shrimp nets and used correctly - provides an avenue of escape for most sea turtles without significant loss of the shrimp catch. *See* 52 Fed. Reg. 24244 (June 29, 1987). While TEDs certainly do not eliminate the harm to sea turtles from shrimp trawling, if properly installed and maintained, they may reduce

the mortality of some sea turtle species by up to 97 percent. *Id.*[1]

Since 1987, regulations issued pursuant to the ESA have required virtually all U.S.-flagged shrimp vessels harvesting in the migratory ranges of sea turtles to use TEDs on their nets at all times. *Id.* at 24247-24248; 57 Fed. Reg. 40861, 40868 (Sept. 8, 1992).[2] Recognizing that effective conservation of migratory sea turtle species requires a global solution, however, Congress enacted Section 609 in 1989 to impose similar requirements on the shrimping vessels of other nations. Section 609, which is codified as a note to the ESA, seeks to induce foreign countries to adopt turtle-safe practices by imposing a mandatory embargo against trawl-caught shrimp from any nation not certified as meeting specific comparability requirements:

> (b)(1) In general. — The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).
>
> (2) Certification procedure.—The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the President shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that -
>
> > (A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing

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[1] Thus, under even the best of circumstances, TEDs still have a 3% failure rate. The impact on sea turtles is compounded over time, particularly in areas and during periods when trawling activity intensifies.

[2] The regulations do not require TEDs on certain trawls, including those used in cold water where turtles are not found, manually operated (artisanal) trawls, and trawl types rarely used in shrimping. 57 Fed. Reg. at 40868.

> the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and
>
> (B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by the United States vessels in the course of such harvesting; or
>
> (C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

§ 609(b), Title VI, of the Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. 101-162, 103 Stat. 1037 (Nov. 21, 1989) (codified at 16 U.S.C. § 1537 note (2000)).[3]

The legislative history of Section 609 confirms that its primary purpose is to ensure the global protection of sea turtles by compelling foreign nations to impose conservation requirements on their shrimp fleets comparable to those imposed on the U.S. fleet. During the floor debates on the bill, Section 609's sponsor, Senator Breaux, stated that "the amendment I am offering today is intended to promote the international conservation of sea turtles," and that "this amendment focuses on the role that other nations must play if we are to fulfill our goal of effective sea turtle conservation." 135 Cong. Rec. S8335, 8373-74 (July 20, 1989). The floor debates also clarify that Congress intended the law to provide an equitable market for the domestic shrimp industry, by requiring other countries' shrimp fleets to bear the same conservation burden. Senator Breaux summarized these two objectives this way:

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[3] In 1990, the President delegated his responsibilities under Section 609 to the Secretary of State. 56 Fed. Reg. 357 (Jan. 4, 1991).

> It is patently unfair on its face to say to the U.S. industry that you must abide by these sets of rules and regulations, but other countries do not have to do anything, and, yet, we will then give them our market. That is exactly what is happening. I think the amendment . . . is a good amendment. It will require other countries to do exactly what we are being required to do, and if in fact they do not, they will lose the U.S. market.

135 Cong. Rec. S12191, 12266 (Sept. 29, 1989); *see also id.* (statement of Senator Johnston that the legislation would create "an effective protection first for sea turtles, and alternatively help for the price of shrimp for our shrimpers in Louisiana").

There can be little question that the federal respondents have long understood Section 609 as directing them to embargo all mechanized trawl-caught shrimp from any nation that does not meet the law's certification requirements. In his first report to Congress on implementation of the law, then-Secretary of State James Baker admitted that:

> The principal feature of Section 609 in this regard is the mandatory ban on shrimp imports, effective May 1, 1991, from all countries whose commercial operations may adversely affect those species of sea turtles protected by U.S. regulation unless those countries adopt measures governing the incidental taking of turtles comparable to the regulations in effect in the United States.

CAJA 449, 453-454; *see also* 56 Fed. Reg. 1051 (Jan. 10, 1991). For more than six years, respondents provided no exception in their implementing regulations for shrimp from particular shipments that had been harvested using TEDs.

Respondents have also long understood the twin aims of Section 609, and have in fact argued strenuously in support of the law's conservation purpose before the WTO. *See, e.g., United States–Import Prohibition of Certain Shrimp and*

Shrimp Products, First Submission of the United States, WT/DSB/M/31, ¶ 76 (June 9, 1997) (arguing that Section 609 as a whole, and Section 609(b) in particular, is "intended to protect and conserve sea turtles"). Indeed, based on respondents' assertions and its own evaluation of the law, the WTO issued a ruling in 1998 stating that Section 609's import ban falls within the meaning of Article XX(g) of the General Agreement on Tariffs and Trade ("GATT"), specifically because it is "directly connected with the policy goal of conserving sea turtles." *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, ¶ 140 (Oct. 12, 1998). Moreover, in November, 2000, the United States Trade Representative's Office reiterated its view that "Section 609 is intended to promote the conservation of endangered sea turtle species. . . ." 65 Fed. Reg. 69118, 69119 (Nov. 15, 2000).

1. Proceedings Before The CIT.

In 1994, Petitioners sued respondents in the Court of International Trade ("CIT") seeking to overturn regulations unlawfully restricting Section 609's embargo to nations in the wider Caribbean. Petitioners averred that the regulations flatly contradicted Congress' directive that Section 609(b) be applied to all countries with commercial shrimp trawl operations in sea turtle waters. The CIT agreed, ruling that the statute is "clear and unambiguous" in its application to "'*all foreign governments* which are engaged in, or which have persons or companies engaged in, commercial fishing operations which . . . may affect adversely [endangered or threatened] species of sea turtles,'" and that it is "not susceptible to differing interpretations." *Earth Island Inst. v. Christopher*, 913 F. Supp. 559, 575, 578 (CIT 1995) (quoting Section 609(a)(2)) (emphasis added).

The CIT also determined that, under Section 609(b)(2)(A), a nation could not be certified as having a regulatory program comparable to that of the United States unless its regulations required the use of TEDs on *all* trawls that can harm sea turtles. *Id.* at 578-579. Similarly, under

Section 609(b)(2)(B), the government could presume that a harvesting nation's average rate of incidental taking was comparable to the United States *only if the nation's fleet used TEDs on all of its commercial shrimp trawls. Id.*

Despite this opinion, and in anticipation of trade-related objections to the shrimp embargo, on April 19, 1996 respondents published revised Guidelines, which did an 180 degree turn from their own long-standing interpretation of the law. *See* Pet. App. 128a-136a (the "1996 Revised Guidelines"). The 1996 Revised Guidelines permitted countries that did *not* adopt comparable turtle protection regulations—i.e., that could not be, and were not, certified under Section 609(b)(2)—to have *full* access to the United States market. Specifically, the Guidelines allowed individual shipments of shrimp to be imported from countries that had not adopted fleet-wide TED requirements, so long as the *individual vessel* produced a form stating that the shrimp on board had been harvested using a TED. Pet. App. 131a-132a. This revision, which directly contradicted both the CIT's and respondents' own prior interpretations of the law, opened a loophole large enough to swallow Section 609(b): countries now could evade the embargo penalty for failure to adopt nationwide TED regulations simply by equipping enough trawls with TEDs as were necessary to serve the United States market.

On June 20, 1996, petitioners moved to enforce the CIT's judgment and to require respondents to exclude all mechanized trawl-caught shrimp from countries not certified under Section 609(b)(2). On October 8, 1996, the CIT ruled that respondents' latest "attempt at foreign accommodation, if not circumvention," was constrained by the plain language and structure of Section 609:

> the constitutional, legislated will of Congress remains unambiguous upon reading and rereading its manifestation in Section 609 . . . .
>
> * * * *

> Understandably, the focus [of Section 609(a)] is not primarily on . . . persons or companies (or the nets in use during their trawling). And the same must be said of part (b) of section 609, supra. Its principal focus is 'harvesting nation.' *And this international focus has been well-understood by the U.S. government and reported upon in the annual certifications to Congress.*

Earth Island Inst. v. Christopher, 942 F. Supp. 597, 603-04, 605 (CIT 1996) (emphasis added).

2. Proceedings Before The WTO.

While this case was pending before the CIT, India, Malaysia, Pakistan and Thailand[4] jointly requested consultations with the United States regarding Section 609's shrimp embargo, under the auspices of the GATT. When consultations failed, the WTO's Dispute Settlement Body ("DSB") established a panel to decide the parties' dispute. On May 15, 1998 the DSB adopted the panel's report, which found that Section 609 violated the GATT because, *inter alia*, it requires the embargo of TED-caught shrimp from uncertified nations. *See United States–Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, WT/DS58/R (May 15, 1998).

However, shortly after the panel issued its decision, the Federal Circuit vacated the CIT's ruling compelling enforcement of the embargo against all trawl-caught shrimp, purely on procedural grounds. *Earth Island Inst. v. Albright*, 147 F.3d 1352 (Fed. Cir. 1998). No longer subject to the court's injunction, and in the midst of its appeal of the panel decision to the WTO Appellate Body, the government seized the opportunity to issue new Guidelines reaffirming its decision to allow the importation of TED-caught shrimp from

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[4] Three of these countries—India, Malaysia, and Pakistan—had not implemented any TEDs requirements in their shrimp fisheries. *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, First Submission of the United States, WT/DSB/M/31, ¶ 57 n.52 (June 9, 1997).

uncertified nations. Pet. App. 137a-147a (the "1998 Revised Guidelines").

In November of 1998, the Appellate Body issued its ruling. Based on respondents' assertions and its own analysis of the law, the Appellate Body concluded that Section 609's import ban is "designed to influence countries to adopt a national regulatory program requiring the use of TEDs by their shrimp fishermen," and, as such, is "directly connected with the policy goal of conserving sea turtles." *See United States–Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, ¶¶ 138, 141-42; *see also id.* ¶ 168 (noting that the "very policy objective" of the law is "the protection and conservation of highly migratory species of sea turtles"). As such, Section 609 qualified as a valid measure relating to the conservation of an exhaustible resource under the WTO Agreement. *Id.* ¶ 145. Nevertheless (and apparently notwithstanding respondents' reissued Guidelines, which had not yet taken effect), the Appellate Body found the law to be inconsistent with U.S. obligations under the accord, because—among other things—it requires the embargo of TED-caught shrimp from uncertified nations. *Id.* ¶¶ 164-65. Shortly after the DSB adopted the Appellate Body's ruling, the government notified the WTO of its intention to comply.

3. The Current Litigation.

Petitioners filed this action in September of 1998 challenging respondents' 1998 Revised Guidelines as contrary to the CIT's prior rulings and Congress' intent under Section 609. On April 2, 1999, the CIT granted petitioners' motion for summary judgment, stating that, "that part of the 1998 Revised Guidelines which constitutes the decision to permit the importation of TED-caught shrimp from uncertified nations, on its face, is not in accordance with [the law]. . . ." Pet. App. 103a. Once again, the court noted the "clarity of purpose and cohesiveness of content" of Section 609, and found that

> [c]ertainly, Congress did not intend to, or in fact, leave room for the kind of reversal of course the defendants attempt to renew herein. Indeed, prior to the court's judgment in Earth Island Institute v. Christopher that the government was in violation of the intent of Congress that section 609 apply to shrimp shipments from everywhere in the world, not just the wider Caribbean, the act was administered exclusively on an international basis, as recently explained at length to the WTO.

Pet. App. 100a-102a.

On July 19, 2000, the court entered final judgment, granting petitioners declaratory relief on their claims. While on the one hand the court affirmed "without reservation that the plaintiffs have prevailed on the threshold issue" of whether respondents' shipment-by-shipment policy violates Section 609, it claimed that petitioners had failed to present sufficient "evidence" to require the court to set aside respondents' illegal regulations. Pet. App. 64a-67a.

4. The Federal Circuit's Decision.

Both sides appealed the CIT's ruling to the U.S. Court of Appeals for the Federal Circuit, pursuant to that court's jurisdiction under 28 U.S.C. § 1295(a)(5). On March 21, 2002, a divided panel of the Federal Circuit reversed the CIT's judgment that the government's decision to permit the importation of TED-caught shrimp from uncertified nations violates Section 609, and affirmed the CIT's denial of injunctive relief. Writing for the majority, Circuit Judge Clevenger wrote that

> the contest between Turtle Island and the government over the interpretation of section 609 has a long and tortured history, chiefly marked by the government's Protean efforts to escape the statutory interpretations being imposed upon it by the [CIT].

Pet. App. 7a. Apparently, in order to relieve the government of such interpretations, Judge Clevenger premised the majority's analysis on a rather astonishing—and demonstrably incorrect—proposition:

> we find nothing in the legislative history to mandate a nation-by-nation approach, and we find little, if any, indication that minimizing sea turtle drownings was Congress's main concern when it enacted section 609.

Pet. App. 18a.[5]

The majority wrote that it could not "agree with Turtle Island that the fidelity of the government's implementation of section 609 should be measured solely by how effectively the measures protect endangered sea turtles." Pet. App. 21a. Therefore, "[w]hile the text [of the law] might not absolutely bar" petitioners' interpretation, the majority found that respondents' shipment-by-shipment embargo was also an appropriate construction of Section 609. Pet. App. 17a. Its scientific reasoning:

> As we state above, section 609 was not enacted with the primary goal of minimizing sea turtle deaths. But as a matter of pure logic . . . [a]ssuming sea turtles obey the laws of terrestrial probability, then a fleet partially equipped with TEDs will kill fewer sea turtles than a comparable fleet without any TEDs (so long as there are a finite number of trawling vessels and some sea turtles survive). A fleet fully equipped with TEDs would likely save more

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[5] In fact, the legislative history—discussed at length in Judge Newman's opinion—shows Senator after Congressperson rising to decry the drowning of sea turtles, and to endorse a *national*, rather than piecemeal, approach to solving the problem of sea turtle deaths. Pet. App. 29a-34a. What is perhaps most staggering about the majority's view of the purpose of Section 609 is that there is not a scintilla of support for, or even discussion of, a "shipment by shipment" import restriction as opposed to an embargo.

> turtles, but equipping only a portion of a fleet with TEDs is not entirely futile.

Pet. App. 21a-22a.

In dissent, Judge Newman pointed out the fallacy in the majority's legal analysis and "pure logic." The dissent quoted from extensive legislative history, all of which "illustrates the congressional purpose of protecting ... endangered [sea turtles] worldwide, while avoiding any disadvantage to domestic shrimp fishing interests due to their obligatory use of TEDs." Pet. App. 32a (citing statements of Senators Breaux, Chafee, Johnston , Hollings, and Shelby.) The dissent also noted that the "State Department's 1991 guidelines initially interpreted the statute ... in compliance with section 609(b)" but "changed its interpretation ... apparently in response to trade-related objections ... and no longer required that all of a nation's shrimp trawlers meet standards at least as rigorous as those imposed on shrimpers in United States waters." Pet. App. 28a. Judge Newman went on to reject the State Department's new interpretation that a harvesting nation's use of TEDs on only a portion of its fleet was not "commercial fishing technology which may affect adversely" sea turtle species, finding that "mechanized commercial shrimp trawling constitutes a considerable threat to sea turtles, a threat that is not relieved when only some of the trawlers use TEDs." Pet. App. 35a.

5. The Order On Rehearing.

After petitioners requested a rehearing in the Federal Circuit and suggested rehearing *en banc*, on August 8, 2002, the court denied the petition without comment on the merits. However, Judges Garjarsa and Newman filed and published a detailed dissenting opinion stating, *inter alia*,

> The majority made a fatal error .... The majority determined that: Because TED-caught shrimp have not been harvested with commercial fishing technology that may harm sea turtles, the statutory language does not support embargoing TED-caught

> shrimp from uncertified countries.... But TED-caught shrimp *have* been harvested with commercial fishing technology that may harm sea turtles. Unlike aquacultured shrimp, or hand-caught shrimp, mechanized commercial shrimping vessels drown some sea turtles even when those vessels are installed with TEDs.... Thus, mechanized commercial shrimp trawling is 'commercial fishing technology that may harm sea turtles.' This is so even if a particular trawler is installed with TEDs, and is particularly true where only part of a fleet has been installed with TEDs.

Pet. App. 107a-108a (emphasis in original). The dissenters also noted the fundamental flaw in the majority's construction:

> Section 609(b)(1) plainly bans the importation of shrimp harvested with mechanized trawlers unless, pursuant to section 609(b)(2), the harvesting nation obtains certification of its regulatory program (by equipping its entire fleet with TEDs) or harvests in waters uninhabited by endangered sea turtles ... the statutory structure demands this interpretation; it is incongruous to interpret the scope of the embargo as narrower than its exceptions.
>
> The panel majority's interpretation renders the certification exception a nullity.

Pet. App. 108a. Finally, the dissent concluded:

> From 1991 to 1996, the State Department ... adopted a nation-by-nation, not a shipment-by-shipment construction of the statute. In 1996, in response to pressure from some countries through the WTO, the State Department revised its Guidelines to require only shipment-by-shipment certification.... [T]his interpretation of the statute is unreasonable. It is entitled to no deference, particu-

> larly in light of the State Department's earlier, contrary interpretation.
>
> * * * *
>
> Neither the panel majority nor the State Department may properly disregard Congressional intent. The panel majority unreasonably construed a statute that was written to protect turtles so as not to protect them.

Pet. App. 111a-112a.

REASONS FOR GRANTING THE WRIT

A. The Court Of Appeals' Decision Violates Fundamental Tenets Of Our Democracy.

The Court of Appeals' decision raises fundamental questions regarding the appropriate balance of power among the Branches of government in the context of the WTO's international trade regime. It is a cardinal principle of our tripartite system of government that Congress, not federal agencies or the courts, has the authority to make laws and "regulate Commerce with foreign Nations." U.S. Const. art. I, § 8. As this Court stated in *Tennessee Valley Authority v. Hill*:

> While 'it is emphatically the province and duty of the judicial department to say what the law is,' it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.

437 U.S. 153, 194 (1978) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

These principles are recognized in this Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which establishes the framework for construing statutes to effectuate Congressional intent. *Chevron* mandates that, "[i]f the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. It is only when a statute is silent or ambiguous that a court may defer to an agency interpretation—and then, only if that interpretation is reasonable. *Id.* at 843. As discussed above, Judges Acquilino, Newman, and Gajarsa all found that the embargo provisions of Section 609, when viewed (as they must be) in the context of the entire act, are clear and unambiguous in their application to foreign nations that refuse to require TEDs on all mechanized commercial shrimp trawls operating in sea turtle habitat. As such, the Court of Appeals was required to enforce the law in accordance with Congress' intent, even if it favored the agencies' alternate policy choice to limit the scope of the embargo. "[I]t simply is not the role of the court to decide which of the two other branches has proposed the preferable rule." *Mississippi Poultry Ass'n v. Madigan*, 31 F.3d 293, 310 (5th Cir. 1994); *see also Earth Island Inst. v. Christopher*, 948 F. Supp. 1062, 1066 (CIT 1996) (stating that the CIT "is not the proper forum for foreign accommodation or circumvention.").

Even if the embargo provisions of Section 609 were ambiguous (which they are not), the federal respondents' unreasonable construction cannot be justified on the ground that it is more GATT compliant.[6] While it is true that the

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[6] Nor, for that matter, would respondents' interpretation be entitled to much deference under *Chevron*, because for more than six years the agencies construed Section 609 as banning the importation of mechanized trawl-caught shrimp from uncertified nations. *See* Pet. App. 106a (dissenting opinion of Judge Gajarsa, noting that "'[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation

division of power among the federal branches may sometimes best be served by interpreting an ambiguous statute so as not to violate international law (*see Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)), no canon of statutory construction can legitimize an agency's interpretation that—though more consistent with international obligations—so deviates from the structure and purpose of the statute as to effectively eviscerate Congress' intent. *See Chevron*, 467 U.S. at 842; *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988); *Mississippi Poultry Ass'n v. Madigan*, 992 F.2d 1359, 1366-68 (5th Cir. 1993); *The Over The Top; Schroeder v. Bissell*, 5 F.2d 838, 842 (D. Conn. 1925) ("[i]nternational practice is law only in so far as we adopt it, and like all common or statute law it bends to the will of Congress.").

Democracy is not well served when federal agencies engage in "Protean" efforts to evade statutory duties and redraft the law to serve their own policy objectives and those of an international body not accountable to the U.S. electorate. Pet. App. 7a. Judge Newman correctly observed that the panel majority's decision violated principles of separation of powers and conflicted with the decisions of other Circuit courts:

> [T]his court is not authorized to evaluate a pragmatic political accommodation. We, like the Executive branch, are bound by the law as Congress enacted it.
>
> * * * *
>
> Thus, although the government appears to rely on the WTO ruling as requiring United States (and judicial) support of the current Guidelines, neither we nor the State Department has authority to rewrite the statute.

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is entitled to considerably less deference than a consistently held agency view'") (citing *INS v. Cardoza Fonseca*, 480 U.S. 421, 446 n. 30 (1987)).

See Pet. App. 37a-39a.

As discussed at length in the two dissenting opinions, Judges Newman and Gajarsa found that the federal respondents' and panel majority's construction of Section 609 cannot be squared with the language and purpose of the law. Nor, they found, can it be reconciled with the fact that "[i]n the preceding six years . . . the State Department had a conflicting interpretation of the statute," which required a nation-by-nation embargo. Pet. App. 106a (concluding that the panel's decision "contravened well-established Supreme Court precedent directing that the judiciary 'must reject administrative constructions which are contrary to clear congressional intent,' . . . and that '[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view'"). Respondents deviated from this prior, long-standing interpretation solely to counter trade-related objections and avoid an adverse WTO ruling—a "pragmatic political accommodation" now sanctioned by the Court of Appeals' panel. Pet. App. 37a.

Yet, it cannot reasonably be disputed that the Executive's power and duty to execute the laws of the United States as written—and the judiciary's obligation to enforce them—supersede any obligations arising under the WTO agreements. The Uruguay Round Agreements Act ("URAA"), 19 U.S.C. § 3512, which approves the WTO accords, specifically states that, "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. § 3512(a)(1). The Act further provides that nothing therein "shall be construed (A) to amend or modify any law of the United States, including any law relating to . . . (ii) the protection of the environment." 19 U.S.C. § 3512(a)(2). These provisions make clear that a WTO ruling finding a domestic statute or regulation in violation of the require-

ments of the WTO agreements cannot, as a matter of U.S. law, be binding on federal agencies or the courts.

Similarly, the Statement of Administrative Action, which was submitted to and approved by Congress along with the URAA, states that

> [N]either federal agencies nor state governments are bound by any finding or recommendation included in [WTO panel] reports. In particular, *panel reports do not provide legal authority for federal agencies to change their regulations or procedures or refuse to enforce particular laws or regulations, such as those related to human, animal or plant health, or the environment.*

The Uruguay Round Agreements Act, Statement of Administrative Action, Pet. App. 177a (emphasis added). The Statement is to be considered "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. §§ 3511(a), 3512(d).

Other Courts of Appeal—including, at one time, the Federal Circuit—have also held that domestic law must prevail over GATT and WTO rulings. In *Mississippi Poultry Ass'n v. Madigan*, the Fifth Circuit found that the Secretary of Agriculture violated the Poultry Products Inspection Act by adopting regulations that allowed foreign poultry products to be imported into the United States without meeting the same standards required of domestic producers. Although the agency's regulations were more consistent with U.S. trade obligations, the court held this was insufficient to rescue the Secretary's unreasonable construction of the law: "we [must] give effect to Congress' intent, even if implementation of that intent is virtually certain to create a violation of the GATT." 992 F.2d at 1366. The court also rejected outright the agency's claim that Congress cannot violate a trade agreement without first clearly expressing its intention to do so. *Id.* at 1365.

Likewise, in *Suramerica de Aleaciones Laminadas C.A. v. United States*, the Federal Circuit itself acknowledged that GATT decisions cannot change domestic law:

> [T]he GATT is not controlling. While we acknowledge Congress's interest in complying with U.S. responsibilities under GATT, we are bound not by what we think Congress should or perhaps wanted to do, but by what Congress in fact did. The GATT does not trump domestic legislation; if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this Court to decide and remedy.

966 F.2d 660, 667-68 (Fed. Cir. 1992); *see also Algoma Steel Corp., Ltd. v. United States*, 865 F.2d 240, 242 (Fed. Cir. 1989), *cert. denied*, 492 U.S. 919 (1989); *but cf. George E. Warren Corp. v. EPA*, 159 F.3d 616, 623-24 (D.C. Cir. 1998). Although the panel majority did not purport to overrule *Suramerica*, its decision wholly disregarded it, ostensibly on the ground that Section 609 authorized the federal respondents' shipment-by-shipment exception to the shrimp embargo. *See* Pet. App. 26a. Judges Newman and Gajarsa convincingly demonstrated that this interpretation of the statute was wrong, and that by adopting the agencies' unreasonable construction the panel majority effectively permitted the Executive Branch to rewrite domestic law in response to a WTO ruling. *See* Pet. App. 26a-39a, 105a-112a.

B. The Agencies' Construction Of Section 609, Designed To Appease Foreign Trading Partners, Is Fundamentally Flawed.

That the State Department effectively amended the statute by regulation is apparent from an analysis of Section 609's language, legislative history, and respondents' own long-standing contrary interpretation of the law. First, the statute plainly bans "[t]he importation of shrimp or products from shrimp *which have been harvested with commercial fishing technology which may affect adversely [certain] species of sea tur-*

tles. . . ." Section 609(b)(1) (emphasis added). Judges Newman and Gajarsa found that the panel made a "fatal error" in concluding that this language excludes individual mechanized commercial shrimp trawls equipped with TEDs, since "mechanized commercial shrimping vessels drown some sea turtles even when those vessels are installed with TEDs." Pet. App. 108a. Indeed, until their abrupt turn-around in 1996, the federal respondents *themselves* long construed the ban as applying to all mechanized commercial shrimp trawls, whether equipped with TEDs or not. CAJA 463, at 465-66. The reason is simple: unlike aquaculture or handline fishing technology, commercial trawls—even if outfitted with TEDs—still capture and kill endangered sea turtles. *See, e.g.*, 67 Fed. Reg. 37723, 37724 (May 30, 2002) (noting that recent trawl fishing in the South Atlantic by TED-equipped vessels had caused an alarming number of sea turtle deaths, and that the strandings "represent a serious impact to the recovery and survival of the local sea turtle populations.") The threat to sea turtles is compounded when only some vessels in a nation's fleet use TEDs; accordingly, respondents have repeatedly acknowledged that "'[a]ny effective program to allow the recovery of . . . endangered [sea turtle] species must include the required use of TEDs'" by *all* shrimp trawl vessels operating in sea turtle waters. Pet. App. 82a, 85a; *see also* CAJA 86-87 (statement of leading conservation organizations that "virtually no conservation benefit is achieved" by partial TED use.)

Indeed, in a remarkable admission which the panel majority never addressed, respondent Rolland Schmitten—then the Fisheries Administrator for the National Marine Fisheries Service, a Commerce Department agency comprised of marine scientists—wrote to the State Department voicing NMFS' *opposition* to allowing the shipment-by-shipment importation of shrimp from uncertified nations:

> By requiring that TEDs be used only on those vessels that harvest shrimp for export to the U.S. market, sea turtles will be put at greater risk of inciden-

> tal capture aboard non-TED equipped boats in a nation's fleet.
>
> This approach will also reduce the incentive for nations to adopt comprehensive national programs to reduce the incidental take of sea turtles . . . [and] may also result in some certified nations abandoning the comprehensive programs they now have in place or curtailing enforcement of such programs.
>
> A 'shipment-by-shipment' approach will also create enforcement problems. It will be extremely difficult to verify that shrimp being imported as TED-caught from uncertified nations were actually harvested by a trawler using a TED.

CAJA 97; *see also* CAJA 100 at 104, 107 (August 6, 1998 State Dept. Action Memorandum).

Second, the structure of Section 609(b) reveals that logically it can only be applied to imports from nations, not individual shrimpers. The federal respondents read Section 609(b)(1) as though it were a discrete proviso bearing no relationship to Section 609(b)(2), which sets forth the only Congressionally-recognized exceptions to the embargo. The result is nonsensical: for under the respondents' interpretation, Section 609(b)(1) refers strictly to an embargo against *individual shrimp shipments*, while Section 609(b)(2) refers to exceptions to that embargo applicable only to *nations*. In the words of Circuit Judge Gajarsa, "it is incongruous to interpret the scope of the embargo as narrower than its exceptions." Pet. App. 108a; *see also United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) (provisions should not be read in isolation, but rather in context of the statutory scheme.)

Third, "[t]he panel majority's interpretation renders the certification exception [in Section 609(b)(2)] a nullity." Pet. App. 108a. According to the federal respondents' own Guidelines, certification pursuant to Section 609(b)(2)(A) is contingent upon the harvesting nation adopting a regulatory

program that requires "all commercial shrimp trawl vessels operating in waters in which there is a likelihood of intercepting sea turtles [to] use TEDs at all times." Pet. App. 142a- 143a. In addition, a harvesting nation's average rate of incidental taking under Section 609(b)(2)(B) will only be deemed comparable if the nation requires TEDs on all of its vessels. Yet, under the respondents' reading of the law, no country would ever be required to employ TEDs fleetwide, and to thereby demonstrate regulatory and incidental take rate comparability under Sections 609(b)(2)(A) and (B). Rather, countries may bypass these requirements altogether by employing TEDs only on those vessels harvesting shrimp for export to the U.S. market, while allowing the remainder of their vessels to trawl in sea turtle waters without TEDs. Because the respondents' interpretation of Section 609 nullifies a critical component of the statutory scheme— the requirement that nations establish comparable regulatory programs for the preservation of sea turtles and achieve comparable incidental take rates in order to be certified under subsections (b)(2)(A) and (B)—it cannot be deemed to follow from the statute's "plain meaning." *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001) (rejecting statutory interpretation that rendered an exemption clause superfluous); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("The cardinal principle of statutory construction is to save an not destroy. It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section. . . .").

Fourth, the federal respondents' and panel majority's interpretation of Section 609 "flouts" the statute's legislative history. Pet. App. 109a. As Judge Gajarsa explained,

> . . . Congress sought to pursue two goals by enacting Section 609. First, Congress intended to protect sea turtles globally. *Turtle Island*, 284 F.3d at 1300 (Newman, J., dissenting). Second, Congress intended to assure that the domestic shrimp industry was protected from competition with shrimpers

from nations with less stringent (and therefore less costly) regulations that did not require fleet-wide TED installation. *Id.*

The panel majority is unfaithful to both aspects of the legislative history.... According to the panel majority, TED installation 'on vessels not serving the United States market' would not advance Congress's aim of 'achieving parity for the domestic shrimp industry,' because Congress was not concerned with placing domestic shrimpers on equal footing with foreign shrimpers in foreign markets. *Id.* [at 1295]. But, of course, foreign shrimpers who are required to bear the cost of installing TEDs only on those ships serving the United States market also receive a competitive advantage in that market. By equipping only part of their fleet with TEDs, foreign shrimpers can lower the price charged to the United States market. By contrast, the domestic shrimp industry must have TEDs on all of their boats, and the cost of fleet-wide TED installation is reflected in the price they must charge shrimp consumers. The panel majority's interpretation therefore fails to comport with what it called the bill's 'primary purpose,' because it fails to protect domestic shrimpers from competition with foreign shrimpers who are subject to less rigorous, and less costly regulations.

Moreover, the panel majority's interpretation completely ignores the Congressional goal of protecting endangered sea turtles. To echo Judge Newman: 'I do not agree with the majority that if there is a commercial aspect to legislation, the humanitarian purpose becomes irrelevant.' *Id.* at 1302 (Newman, J., dissenting.) The statute states that nations whose shrimpers want to sell shrimp in the United States must protect . . . [endangered sea] turtles.... It was entirely improper for the panel majority to interpret

> the statute inconsistently with this legislative purpose.

Pet. App. 110a (footnote omitted.)

In sum, Judges Newman and Gajarsa, like the CIT, found that the Executive agencies' "interpretation" of Section 609 to remove market barriers for countries that fail to employ TEDs fleet-wide is contrary to the plain meaning and purpose of the law. They also found that the agencies' wholesale reconstruction of the statute was directly prompted by their desire to avoid international tensions over the scope of Section 609's embargo (which the government had previously applied only regionally), and a likely WTO challenge—even if that meant deviating so far from the words and purpose of the statute as to effectively eviscerate it. The Executive's conduct cannot be reconciled with its statutory and Constitutional obligations or with the cardinal principle that Congress, not federal agencies or the courts, has the authority to make laws and regulate foreign commerce. Accordingly, this Court should grant review to address the important questions of federal constitutional and trade law raised by the decision below.

C. This Court's Review Of The Court Of International Trade's Failure To Set Aside The Illegal Guidelines Is Important To Restore Public Confidence In The Judicial System.

This Court should also grant review to address an issue of significant importance raised by the CIT's decision below: the statutory and constitutional obligation of the judiciary to overturn regulations that are contrary to law.[7] The CIT clearly and unequivocally held that the State Department's Revised Guidelines allowing the importation of individual shipments of shrimp from uncertified countries violate Section 609. Pet. App. 64a, 103a. Nevertheless, the court re-

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[7] Although extensively briefed, the Court of Appeals did not reach this question.

fused to set aside the Guidelines, stating that, "the decision of whether or not to grant . . . equitable relief . . . is truly extraordinary in the field of America's foreign affairs," and finding that petitioners did not present sufficient "evidence" that the illegal Guidelines were undermining Congress's goal of species protection under Section 609. Pet. App. 65a. Thus, the court effectively abdicated its responsibility to enforce the law as Congress intended, instead deferring to the Executive branch's alternative policy choice to promote international trade. In doing so, it fundamentally misconstrued its mandatory duty under section 706 of the APA and our tripartite system of government, and—by sanctioning a federal agency's continued illegal conduct—threatened public confidence in the judicial system.

Section 706 of the Administrative Procedures Act ("APA") provides that a "reviewing court *shall* . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . not in accordance with law. . . ." 5 U.S.C. § 706(2) (emphasis added). This Court has made clear that use of the term "shall" in a statute indicates Congress' intent that compliance be mandatory, not discretionary. *See United States v. Monsanto*, 491 U.S. 600, 607 (1989); *Pierce v. Underwood*, 487 U.S. 552, 569-70 (1988). By refusing to set aside the respondents' illegal Guidelines, the CIT's decision violated the plain requirements of the APA. Moreover, its ruling directly conflicts with the decisions of numerous Courts of Appeal, which have construed the language of Section 706 as removing courts' equitable discretion to deny relief for statutory violations. *See, e.g., Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999); *Legal Environmental Assistance Foundation, Inc. v. U.S. EPA*, 118 F.3d 1467, 1473, 1478 (11th Cir. 1997); *Carpet, Linoleum & Resilient Tile Layers v. Brown*, 656 F.2d 564, 566-68 (10th Cir. 1981); *Charlton v. United States*, 412 F.2d 390, 392 (3d Cir. 1969).

The CIT's decision also conflicts with the fundamental principles first set forth in this Court's decision in *Marbury v. Madison*, that it is the role of Congress to establish our laws,

the Executive to administer them, and the judiciary to enforce them. By allowing Executive Branch agencies to continue to administer regulations that it *twice* adjudged contrary to law, the CIT derogated the roles of Congress and the judiciary, and undermined the right of the public to rely on the enforcement of duly enacted legislation. "If an agency is allowed to flout the law, the people affected will soon lose confidence in that agency or perhaps, justifiably, in the total legal system." *International Union of Operating Eng'rs v. Arthurs*, 355 F. Supp. 7, 13 (W.D. Okla. 1973). Accordingly, this Court should grant review to address this crucial error.

D. The Court Of Appeals' Opinion Ratifying A Shipment-By-Shipment Exception To The Shrimp Embargo Conflicts With Supreme Court Decisions Regarding Conservation Of Endangered Species Under The ESA And Undermines Important Policies Reflected In That Statute And Section 609.

Finally, this case also merits review because of the singular importance of the Court of Appeals' decision to the continued existence of critically endangered sea turtle species. According to leading experts in sea turtle conservation, the shipment-by-shipment approach ratified by the panel majority will have serious impacts on the recovery and survival of these species around the globe. CAJA 86, 199-203.

The Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.* was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such . . . species." 16 U.S.C. § 1531(b). To this end, it directed that "all [f]ederal departments and agencies shall seek to conserve endangered species and threatened species." 16 U.S.C. § 1531(c)(1). In *Tennessee Valley Authority v. Hill*, this Court confirmed that the manifest purpose of the ESA is "to halt and reverse the trend toward species extinction, whatever the cost," and *"to give endangered species priority over the 'primary missions' of federal agencies."* 437 U.S. at 184-85 (emphasis added).

All five species of sea turtles at issue in this case are listed as endangered or threatened under the ESA. The status of some of these creatures is so precarious, scientists have predicted that continued mortality due to commercial fishing will soon erase them from the Earth forever. *See, e.g.*, Spotila, et al., *Pacific Leatherback turtles face extinction*, 405 Nature 529-530 (June 2000). Although the federal respondents have repeatedly acknowledged that the incidental capture and drowning of turtles in shrimp trawl nets is the single largest contributor to the demise of turtle species, they nonetheless opted to remove important protections for these animals under Section 609 in order to promote their primary trade and foreign policy missions. The panel majority's opinion, which ratifies this action, cannot be squared with Congress' intent under the ESA and this Court's decision in *TVA v. Hill*.

Nor can the Court of Appeals' decision be reconciled with the conservation aims of Section 609. As discussed above, the legislative history, statutory language, findings of the WTO, and the government's own construction of the law show beyond any question that Congress' principal aim in enacting Section 609 was to protect endangered sea turtles. As such, the panel majority's finding that Congress somehow was unconcerned with protecting these creatures (Pet. App. 18a-19a)—despite the abundant evidence to the contrary—defies credulity. The government's own scientists at NMFS and experts in the field of turtle conservation have acknowledged that, by adopting the State Department's shipment-by-shipment approach to the shrimp embargo, the Court of Appeals' decision will put sea turtles "'at greater risk of incidental capture aboard non-TED equipped boats in a nation's fleet,'" Pet. App. 36a, and hasten the demise of endangered turtle species. *See* Brief of Amicus Curiae Dr. Paladino, et al. in Support of Petition for Rehearing; CAJA 86, 199-203. As Judge Gajarsa stated, "the panel majority unreasonably construed a statute that was written to protect turtles so as not to protect them." Pet. App. 112a. If the

panel's decision is the last word on the subject, it will have left a remarkable legacy: sanctioning the extinction of species which predated the dinosaur and which are "the repository of an irreplaceable biological memory of the origins of life on earth."[8]

CONCLUSION

Because of the important issues presented by this petition, petitioners respectfully request that the Court grant the writ of certiorari.

Respectfully submitted,

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[8] Statement of Homero Aridjis, co-founder and President of *Grupo de los Cien, reprinted in* 50 Marine Turtle Newsletter (July 1990).